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No. 114.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

JAMES C. DAVIS, AGENT OF THE PRESIDENT AND DIRECTOR GENERAL OF RAILROADS, PETITIONER,

v.

PORTLAND SEED COMPANY, RESPONDENT.

UPON WRIT OF ~~ERROR~~ certiorari TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR DIRECTOR GENERAL OF RAILROADS.

DAMAGES UNDER FOURTH SECTION OF ACT TO REGULATE COMMERCE. WAS THE DIRECTOR GENERAL SUBJECT TO THE FOURTH SECTION?

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REASONS FOR AND SCOPE OF SUPPLEMENTAL BRIEF.

This supplemental brief upon behalf of the petitioner, James C. Davis, Agent of the President and Director General of Railroads, is necessary for the following reasons:

(1) To place before the Court a somewhat different construction of the fourth section with reference to

damages than that set forth in the brief heretofore filed upon behalf of the petitioner but prepared by counsel for the carrier formerly under Federal control, the Oregon-Washington Railroad & Navigation Company.

(2) To place before the Court certain additional reasons why the Director General should not be held subject to the fourth section.

(3) To point out to the Court certain deficiencies in the record before the Court which may prevent the Court from considering facts of the utmost importance, and of which the Court should be advised in order that the Court may properly delimit its decision on this record so as to avoid any possibility of prejudicing a consideration of such facts if properly presented on other records.

This case involves alleged violations of the long-and-short-haul clause of section 4 of the Act to Regulate Commerce, in connection with two shipments of alfalfa seed, both originating at Roswell, New Mexico, and being consigned, respectively, to Yakima and Walla Walla, Washington, the first being shipped on December 19, 1918, and the second on January 4, 1919. Charges were collected on the published through rate of $2.44 per hundredweight. There was contemporaneously in effect from Pecos, Texas, a point more distant from both Yakima and Walla Walla than Roswell, New Mexico, a rate of $1.51½.

At the outset, and before undertaking to discuss the proper construction of the fourth section or its

application to the Director General, it is desired to point out to the court the deficiencies of this record.

This record fails to show affirmatively, what was the fact, that from and after June 25, 1918, the Interstate Commerce Commission had by its fourth section order 7316 granted relief to the Director General from the provisions of the fourth section under the powers conferred upon the Commission by the first proviso of that section

> from time to time (to) prescribe the extent to which such designated common carriers may be relieved from the operation of this section,

and that reference to the Commission's order appeared on the face of the tariffs themselves.

There is appended to this brief a copy of this fourth section order of the Commission.

It should be noted, moreover, that while this fourth section order was not made part of the record in the District Court, some intimation of it apparently was given to the Circuit Court of Appeals, as appears from the decision of that court. (Tr. 51.) It would seem, however, that the order was either not clearly put before the court, or the court did not clearly understand it. In any event, the court held that, since it had not been considered by the lower court, it was not before the Court of Appeals for decision. The Director General is not advised whether, under the peculiar circumstances of this case, this Court will take judicial notice of this order. The existence or nonexistence of such an

order, however, may well be, as will subsequently appear, of controlling effect in determining whether damages should be awarded in connection with the fourth section, and as this case is but one of a considerable number of cases which are now or will shortly be before this Court, it is essential to refer to the order, if for no other purpose than to distinguish those cases where it properly appears of record.

Likewise it might seem that, since it is the Director General's contention that he was not subject to the fourth section, it would be superfluous for him to discuss the question of damages under that section. The Director General, however, believes that nothing will more clearly serve to demonstrate that the fourth section could not have been applicable to him than a correct understanding of the meaning of that section, and of what Congress intended to accomplish by it. Therefore, before discussing the applicability of the fourth section to him, the Director General will seek to make clear what he believes to be the proper construction of that section, since by so doing it must become obvious that the provisions of that section are necessarily in direct conflict with the power to initiate rates conferred upon the President by the Federal Control Act, and by the President delegated to him.

Moreover, as this case involves only the long-and-short-haul clause of the fourth section, it might seem unnecessary to consider the subsequent clause of that section making unlawful a through rate in

excess of the aggregate of intermediate rates subject to the act. The Director General, however, believes that a proper construction of the long-and-short-haul clause of the fourth section can not be arrived at without a consideration of the relation of that clause to the fourth section as a whole, and of its interrelation with, as well as its difference from, the aggregate-of-intermediates clause. Furthermore, by a consideration of the fourth section as a whole a consistency appears in its terms which is obscured by any attempt to consider its various provisions independently of each other. Indeed, the conflict of opinion in the Interstate Commerce Commission itself as to the proper construction of both clauses with reference to damages, as shown by various dissenting opinions whenever the construction of either clause has been attempted, would appear to arise from a disposition to construe the clauses not only as independent of each other but apart from other provisions of the fourth section as well. On the other hand, since numerous cases under this section, involving several hundred thousand dollars to the government, are now or will shortly be before this Court, it is imperative for the protection of the government's interests that the relation of this case, which involves only the long-and-short-haul clause, be made clear to other cases involving the aggregate-of-intermediates clause and to still others involving both clauses. The proper construction of the fourth section in connection with damages will, therefore, first be discussed, and then the question as to whether the Director General was subject to that section.

DAMAGES IN CONNECTION WITH FOURTH SECTION.

The Court can not keep too clearly in mind the fact that the theory underlying the case of the respondent (hereinafter referred to as the plaintiff), and the theory of both the District Court and of the Circuit Court of Appeals, is that the rate legally applicable between Roswell and Walla Walla, and the rate which the carrier, therefore, should have collected, was not the higher rate actually published in the tariffs between Roswell and Walla Walla,[1] but was the lower rate published in the tariffs from Pecos, the more distant point, to Walla Walla. In other words, it is the plaintiff's contention, and the theory of both courts, that by applying the prohibition of the long-and-short-haul clause of the fourth section to the tariffs, the higher rate actually published from Roswell to Walla Walla becomes illegal to the extent that it must be read out of the tariffs, and that, in like manner, the lower rate from Pecos to Walla Walla, though not actually published in the tariffs to apply from Roswell, must, in effect be treated as actually published from that point and to be the only legally published rate from Roswell, and therefore the only rate which the carrier could legally collect under the provisions of section 6 of the Act to Regulate Commerce. In short, it is contended that the collection of the higher rate actually published between Roswell and Walla Walla was a

[1] For convenience reference will be made here only to the shipments from Roswell to Walla Walla, the situation as to the two shipments in relation to the fourth section being similar.

straight overcharge above what is contended to be the only legally published rate, the lower rate from Pecos to Walla Walla, though this latter rate was never actually published from Roswell.

In this, as will subsequently be more fully shown, the plaintiff and both courts come into direct conflict with what would seem to be the conclusion necessarily to be drawn from numerous decisions of this Court, and particularly from its decision in the case of *Pennsylvania Railroad Co.* v. *International Coal Co.*, 230 U. S. 184. In that case this Court made clear that the paramount and controlling provision of the Interstate Commerce Act is the requirement of section 6 of that act that the actually published rate and no other be, under all circumstances, collected from all shippers alike, leaving a shipper the right, if such rate is unlawful under any other section of the act, to recover damages under the provisions of sections 8 or 16. Moreover, the plaintiff's contention is in direct conflict with the decision of the Interstate Commerce Commission in the case of *Iten Biscuit Co.* v. *C., B. & Q. R. R. Co.*, 50 I. C. C. 724, and with numerous other decisions and administrative rulings of the Commission, all recognizing as inflexible the requirement of section 6 that the actually published rate be collected under all circumstances.

The decisions of this Court and of the Commission in this respect will subsequently be considered in some detail, but the Director General believes that it will conduce to a clearer understanding of his position if he first sets out briefly and without argument

what he contends to be the correct construction of the fourth section with reference to damages, before attempting to set out the reasoning by which such a construction is reached, or the relation of such a construction to the decisions of the courts and of the Commission. For convenience the fourth section has been appended in full to this brief.[2]

The Director General submits that the correct construction of that section with reference to damages because of violations thereof, or in connection with authorized departure therefrom, is as follows:

(1) That under any and all circumstances the published rate must be collected, whether that rate violates the long-and-short-haul clause because greater than the rate charged and received for a longer distance, or because greater than the aggregate-of-intermediates, but that, in either such event, a shipper may make claim for damages under sections 8 or 16 of the act. That under no circumstances is the charging and collecting of such published rate an overcharge in violation of section 6 but, on the contrary, is made mandatory by section 6 itself.

(2) That there is a fundamental distinction between what constitutes a violation of the long-and-short-haul clause on the one hand and a violation of the aggregate-of-intermediates clause on the other.

(a) That the long-and-short-haul clause is violated only by the actual charging and receiving of a greater compensation for a shorter

[2] The fourth section as appended is the fourth section as amended in 1910, and as in effect during the period of Federal control, and until amended at the termination of Federal control by the amendments of 1920.

distance than is actually charged and received for a longer distance, and is not violated by the mere publication of a lower rate as applicable to the longer distance.

(b) On the contrary, that the aggregate-of-intermediates clause is violated by the charging of a through rate greater than the published aggregate of intermediate rates, even though such intermediate rates are never actually charged or received.

(3) That while there is thus a distinction as to what constitutes a violation of the respective clauses, once a violation of either is established the measure of damages is substantially the same.

That is, that in the case of the long-and-short-haul clause the shipper is at least presumptively damaged to the extent of the difference between the higher rate charged and received for the shorter distance and the lower rate actually charged and received for the longer distance, while in the case of the aggregate-of-intermediates clause the shipper is presumptively damaged in the amount of the difference between the higher through rate charged and the lower aggregate of intermediates published. Moreover, that this damage exists in both instances without reference to either the reasonableness or unreasonableness of the higher or the lower rates.

(4) That there is no violation of the fourth section and therefore no question of damages under that section—

(a) Where, as to both the long-and-short-haul clause and the aggregate-of-intermediates

clause, the Commission has, under the provisions of the fourth section, relieved the carrier from the operation of that section;

(*b*) Where, as to the long-and-short haul clause, even though the Commission has not granted relief, there is no proof that the lower rate was actually charged and received from the more distant point.

(5) That even where the fourth section is not violated, because of relief granted by the Commission from its provisions, or in addition, as to the long-and-short-haul clause, because no proof that the lower rate was actually charged or received from the more distant point, the shipper may still be entitled to damages if, in the case of the long-and-short-haul clause the higher rate for the shorter distance, or in the case of the aggregate-of-intermediates clause the higher through rate, is unreasonable under section 1, or discriminatory or unduly prejudicial under sections 2 and 3.

In both instances the Director General concedes that the higher rate for the shorter distance, on the one hand, or for the through rate on the other, is prima facie unreasonable; in the one instance because higher than the rate from or to (as the case may be) the more distant point, and in the other because higher than the aggregate of the intermediates. While, however, he concedes that both rates are prima facie unreasonable, he submits that the unreasonableness of both is prima facie only, and may be rebutted; as to the long-and-short-haul clause by showing the rate to the

point beyond depressed below a maximum reasonable basis by water or other competition, and the rate to the intermediate point fairly comparable with other rates for similar services under similar conditions; as to the aggregate-of-intermediates clause by showing that the intermediate rates are likewise depressed below a reasonable maximum basis, and that the through rate is fairly comparable with other rates for similar services and distances under similar conditions.

Again the Director General concedes that, even if the carrier sustains the burden of showing the rate for the shorter distance, in the case of the long-and-short-haul clause, or the through rate, in the case of the aggregate-of-intermediates clause, reasonable, both rates may still result in discrimination or prejudice under sections 2 or 3, and the carrier may be liable for damages if the shipper so shows, and in addition, proves actual damage as required by the decision of this Court in the case of *Pennsylvania Railroad Co.* v. *International Coal Co.*, 230 U. S. 184, in connection with violations of sections 2 and 3.

If the foregoing be a correct construction of the fourth section, the plaintiff in these cases can not recover for the following reasons:

While these cases involve the long-and-short-haul clause of the fourth section alone, and while the record fails to show, what was the fact, that the Commission had relieved the Director General from the operation of the fourth section and that the tariffs themselves actually bore a reference to the

Commission's order, there is still no proof of any violation of the fourth section, since there is neither any proof, nor any attempt to prove, the actual charging and receiving of the lower rate concededly published to the more distant point. Moreover, on this record no question can arise of any possible violation of the first, second, or third sections, or any possible right of damages under those sections, since the sole claim here is of violation of the fourth section, and of overcharge contended to result therefrom. Indeed, whatever the jurisdiction of the court may have been to entertain this suit for alleged violation of the fourth section,[4] there can be no question that the court would have been absolutely without jurisdiction to entertain a suit for damages because of alleged unreasonable rates under the first section, or discriminatory or unduly prejudicial rates under the second and third sections, without a precedent determination by the Interstate Commerce Commission of the questions of unreasonableness, of discrimination, or of undue prejudice. *Texas & Pacific Ry. Co.* v. *Abilene Oil Co.*, 204 U. S. 426; and *Robinson* v. *Baltimore and Ohio R. R. Co.*, 222 U. S. 506.

There, therefore, can be upon this record no burden upon the Director General to rebut what might otherwise be contended, that the rate from Roswell for the shorter distance was prima facie unreason-

[4] Again, for the purposes of this supplemental brief the jurisdiction of the court to entertain a suit for damages for violation of the fourth section has been assumed. The court should note, however, that the joint brief heretofore filed attacks the jurisdiction of the court in this respect.

able because of the lower rate for the longer distance from Pecos.

Likewise, therefore, there can arise no question as to whether discrimination or undue prejudice existed by reason of the higher rate from Roswell, or whether any actual damage may have resulted from such discrimination or undue prejudice, since both questions would clearly have been beyond the jurisdiction of the court in the first instance.

Since, therefore, under the construction of the fourth section contended for by the Director General no recovery can be had by the plaintiff in this case, it becomes pertinent to inquire as to the validity of that construction.

I.

The rate actually published must be collected, even though it violates the fourth section.

It has already been noted that it is the plaintiff's theory, as well as the theory of the District Court and the Circuit Court of Appeals, that the higher rate actually published from Roswell to Walla Walla, because of the provisions of the long-and-short-haul clause of the fourth section, became illegal to the extent that it must be read out of the tariffs, and in like manner that the lower rate from Pecos to Walla Walla, though not actually published in the tariffs to apply from Roswell, must, in effect, be treated as actually published from that point, and to be the only legally published rate from Roswell, and therefore the only rate which the carrier could legally

collect under the provisions of section 6 of the Act to Regulate Commerce.

Before referring to the decisions of this Court and of the Commission which demonstrates the fallacy of any such theory, it is desired to point out that the theory itself involves two assumptions which upon analysis it will be readily seen are without foundation.

In the first place, the theory involves the assumption that the long-and-short-haul clause of the fourth section forbids, and is violated by, the *publication* of a higher rate for a shorter than for a longer distance. As has already been noted, and will subsequently be further developed, the long-and-short-haul clause does not forbid, and is not violated by, mere *publication* of a rate, but forbids, and is violated only by, the *charging* or *receiving of any greater compensation* for a shorter than for a longer distance.

In the second place, the theory involves a *non sequitur*. Even could any possible construction of the prohibition of the long-and-short-haul clause require the higher rate actually published from Roswell to Walla Walla to be read out of the tariffs, there is not provision whatever of the long-and-short-haul clause, or of any other portion of the fourth section which will warrant *reading into the tariffs* the lower rate published solely from Pecos to Walla Walla, so as to treat it as if actually published from Roswell to Walla Walla. On the contrary, the further provision of the fourth section—

> * * * but this shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance,

expressly negatives any authority to charge for the shorter distance the lower rate actually published for the longer distance.

Even assuming, however, that the mere publication of a higher rate for a shorter distance is unlawful under the long-and-short-haul clause of the fourth section, there is no more warrant on that account for reading such a rate out of a tariff than there would be for reading out of a tariff a rate unlawful under section 1 because unreasonable, or unlawful under section 2 because discriminatory, or unlawful under section 3 because unduly prejudicial, yet it can not be gainsaid that this Court has expressly and consistently held that the published rates, even though unlawful under sections 1, 2, or 3, are nevertheless required by section 6 to be charged and retained, and that such published rates are the only rates which may be legally charged until changed as provided by law.

In this connection it is only necessary to refer to the decision of this Court in the case of *Pennsylvania Railroad Co.* v. *International Coal Mining Co.*, 230 U. S. 184. This Court said (p. 197):

> The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it had charged

too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. (February 4, 1887, 24 Stat. 379, c. 104, sec. 2; March 2, 1889, 25 Stat. 855, c. 382, sec. 6. *Armour Co.* v. *United States*, 209 U. S. 56, 83.) The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation.

In view of this imperative obligation to charge, collect, and retain in the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid.

While it is true that the specific question before this Court in the *International Coal* case was discrimination under section 2, it will be noted that the language used by the Court expressly includes unreasonableness under section 1. Indeed, the assumption is warranted that neither the plaintiff nor

either of the lower courts would question this proposition as applied to section 1, 2, or 3. Yet there is no difference in the degree of unlawfulness declared in those sections from the degree of unlawfulness declared by section 4, and it would be reasonable to assume therefore no difference between the several sections in the degree of the obligation to charge and retain the actually published rate.

The only possible difference which can be suggested between sections 1, 2, and 3 on the one hand, and section 4 on the other, is that in order to determine whether a rate is unreasonable, discriminatory, or unduly prejudicial under the first, second, and third sections, respectively, the exercise of the administrative judgment of the Commission must be called upon to determine the degree of unreasonableness, or of discrimination, or of undue prejudice, while under the long-and-short-haul clause of the fourth section the contention might be, and presumably is made by the plaintiff, that the degree of unlawfulness is fixed by the fourth section itself. Not only, however, does any attempt to distinguish the fourth section on this ground involve the fallacious assumptions just pointed out, that is, that the long-and-short-haul clause is violated by the mere publication of a higher rate for a shorter distance, and that such higher rate must not only be read out of the tariffs, but that the lower rate for the longer distance must be read in, but it involves the fundamental error of attempting to construe the fourth section as if that section stood alone. In order to read the

higher rate actually published between Roswell and Walla Walla out of the tariffs, and to permit the carriers to charge between Roswell and Walla Walla the lower rate actually published only from Pecos to Walla Walla, it is necessary to ignore not only the prohibition of section 6 that—

> Nor shall any carrier charge * * * a * * * *less* or different *compensation* for such transportation of * * * property * * * between the points named in such tariffs *than the rates*, fares, and charges *which are specified in the tariffs* filed and in effect at the time,

and to ignore the further prohibition that—

> Nor shall any carrier * * * remit in any manner or by any device any portion of the rates, fares, and charges so *specified*,

but since any possible implication of authority to charge for the shorter distance the lower rate actually published only for the longer distance is, as has been seen, expressly negatived by the provision of section 4 itself that—

> But this shall not be construed as authorizing any common carrier * * * to charge or receive as great compensation for a shorter as for a longer distance,

the result is to require a violation of the further provision of section 6 that—

> No carrier * * * shall engage * * * in the transportation of * * * property * * * unless the rates, fares, and charges

upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act.

A conclusive answer, however, to the plaintiff's contention that the long-and-short-haul clause of the fourth section required the carrier to disregard the higher rate actually published from Roswell to Walla Walla, and to charge only the lower rate actually published from Pecos to Walla Walla, is afforded if the Director General be correct in his position that the fourth section does not forbid, and is not violated by, the mere publication of a higher rate for the shorter distance, but is violated only by the actual charging or receiving of greater compensation for the shorter than for the longer distance. If the Director General is correct in this position, and he will subsequently undertake to sustain it more fully, it follows that the only rate the carrier can charge is the higher rate actually published for the shorter distance, since there is no practicable way by which either the carrier or the shipper could know at the time collection is made whether there has been an actual shipment for the longer distance for which a lower rate has actually been collected. In other words, since even the plaintiff would presumably concede that the published rate must be observed, at least unless the fourth section is violated, there would have been no way in this very case by which either the carrier or the plaintiff itself could have told whether the fourth section was violated, and therefore whether the published rate between Roswell and Walla Walla could be ignored,

since so far as this record goes there is nothing to show that there had been any actual movement from Pecos to Walla Walla and, therefore, any actual charging of the lower rate for such movement.

Moreover, in this connection it must not be overlooked that while rule 77 of the Commission's tariff circular 18–A requires that orders granting fourth section relief be shown upon the face of the tariffs, the Commission does not require that applications for fourth section relief appear upon the tariffs. Therefore, since under the second proviso of the fourth section such applications, until passed upon, afford temporary relief, a shipper could never know whether the published rate was to be observed or not, for even on the plaintiff's theory the published rate could only be ignored if in violation of the fourth section, which it would not be if an application for relief had been filed, and this the shipper would have no way of determining without investigating the Commission's files in Washington.

Before the Director General, however, undertakes to set out more fully the basis for his position that the fourth section is not violated by the mere publication of a higher rate for a shorter distance, it is desired to discuss briefly, first, two decisions of this court, one that in *United States* v. *Louisville & Nashville Railroad*, 235 U. S. 322, and the other in *Boston & Maine Railroad* v. *Piper*, 246 U. S. 439, and then to refer, briefly, to the repeated rulings of the Interstate Commerce Commission which have consistently recognized the imperative obligation

resting upon the carrier to collect the published rate, even though it violates the fourth section.

The case of *United States* v. *Louisville & Nashville R. R., supra,* is cited on page 37 of the brief of the respondent, and the following language is quoted from pages 322 and 323 of that decision:

> The right to continue it (that is, the greater charge for the shorter distance) had been expressly prohibited by statute until on application made to the Commission its consent to that end was given. (Page 322.)
>
> * * * * *
>
> And for the purpose of making the provision efficacious it was enacted that after a time fixed *no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted. Int. Mountain Rate Cases,* 234 U. S. 476. If, then, it be that the rebilling privilege which is here in question, disregarding immaterial considerations of form and looking at the substance of things, was when originally established an exertion of the authority conferred or recognized by Section 4 of the Act, as there is no pretense that permission for its continuance had been applied for, as required by the amendment, and the statutory period for which it could be lawfully continued without such permission had expired, *it follows that its continued operation was manifestly unlawful and error was committed in permitting its continuance under the shelter of the injunction awarded by the court below.* (Page 323.)

The respondent completely and blandly ignores the context in which this language was used. The Court was not passing on the question as to whether the higher rate was the legally applicable rate, but on the question of the Commission's power to forbid the continuance of that rate for the future. Indeed, the last portion of the quotation which is italicized above, but which the respondent did not italicize in its brief, clearly implies the Court's recognition of the fact that although the published rates were unlawful they continued in actual force.

In fact, it can only be said that this latter language of the Court but serves to make clear what can only be termed, with all due respect, the looseness of this Court's prior language, even when its context is considered.

With all due deference to the late Chief Justice, it *was not*—

> enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted.

It was merely enacted that such rates *should be unlawful* for the future unless authorized by the Commission upon application. Such rates, however, were not declared any more unlawful than were unreasonable rates under section 1, or discriminatory or prejudicial rates under sections 2 and 3, and, as has been seen, this Court has uniformly held rates unlawful under any or all of the first three sections, nevertheless, to continue in force until changed as provided by

law. Indeed not the least remarkable aspect of what has come to be known as the Nashville Case, is the fact that no one has since been able to determine just how the late Chief Justice worked out a fourth section violation in that case. No question of fourth section violation was raised by either counsel for the Government or counsel for the carrier, and after the decision the Interstate Commerce Commission, it is to be noted, based its subsequent order on section 3 and not on section 4. See *Duncan* v. *N. C. & St. L. Ry.*, 35 I. C. C. 477. However this may be, the Director General does not apprehend that this court will seek to extend to the determination of the question of what was the legally applicable rate for the past, language used by this Court with reference to the Commission's power for the future, and which was, even in that connection, of questionable accuracy.

On the other hand, the *Piper case*, which is not even cited by the plaintiff (respondent) in its brief, might be claimed to lend some color to the plaintiff's contention that, assuming the rate charged from ~~San Francisco~~ Roswell to ~~North Portland~~ Walla Walla violated the fourth section, it thereby became unlawful to such an extent that it must be read out of the tariff. That case was a suit for damages for delay to a shipment of livestock, and this Court held that a provision in the livestock bill of lading limiting liability for delay caused by the carrier's negligence to the additional cost to the shipper for food and water during the delay, was not binding upon the shipper, although the form of the bill of

lading was published in the tariffs of the carrier filed with the Interstate Commerce Commission. The Court said (p. 445):

> In the bill of lading, now under consideration, there is an express agreement limiting liability from unusual delay and detention, caused by the carrier's negligence, to the amount actually expended by the shipper in the purchase of food and water for his stock while so detained. This stipulation contravenes the principle that the carrier may not exonerate itself from losses negligently caused by it, and is not within the principle of limiting liability to an agreed valuation which has been made the basis of a reduced freight rate. Such stipulations as are here involved are not legal limitations upon the amount of recovery, but are in effect attempts to limit the carrier's liability for negligence by a contract which leaves practically no recovery for damages resulting from such negligence. *While this provision was in the bill of lading, the form of which was filed with the Railroad Company's tariffs with the Interstate Commerce Commission, it gains nothing from that fact.* The legal conditions and limitations in the carrier's bill of lading duly filed with the Commission are binding until changed with that body (*Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 654); but not so of conditions and limitations which are, as is this one, illegal, and consequently void.

It might be contended that the portion of the Court's opinion which has been italicized, if carried to its logical conclusion, would warrant the holding that any provision of a tariff which is unlawful or illegal because in contravention of some statute or decision may be disregarded. It must be remembered, however, that the question upon which this Court was passing was not whether the lower rate to which the invalid condition attached remained, nevertheless, applicable to the shipment, but whether in a suit for damages for delay the invalid condition itself could limit the carrier's liability for delay, whatever rate was legally applicable. There is nothing in this Court's opinion in the *Piper case* which would indicate what would have been its decision had it been called upon to say whether the lower rate to which the invalid condition attached remained, nevertheless, applicable or whether the higher rate provided by the tariffs in the absence of such condition became the applicable rate. Moreover, whatever the decision of this Court might have been even in such a case, it is clear that it could have no application here, for, as has already been pointed out, the Court here could not read out of the tariff the rate actually published between Roswell and Walla Walla and read into the tariff the rate actually published only between Pecos and Walla Walla without violating not only the mandatory provisions of section 6 of the Act, but the express provisions of section 4 itself.

It is submitted, therefore, that this court should not hesitate to extend specifically to the fourth section the doctrine of the *International Coal case*, consistently applied by this court to the first, second, and third sections; that is, that the actually published rate must under all circumstances be collected and retained, even though that rate be unlawful under some other section of the Act, leaving the shipper, however, the right, if otherwise unlawful, to obtain damages under section 8 or section 16.

Furthermore, it should be persuasive to the court that the Interstate Commerce Commission itself has consistently held that under section 6 of the Act the actually published rate must be collected, not only where the actually published rate violates sections 1, 2, and 3, but even where it violates section 4.

In its Conference Rulings the Commission has invariably held that the published rate must be collected, even where it violates section 4. It is true that the violations upon which the Commission has specifically passed have been violations of the aggregate-of-intermediate clause, but its rulings are the stronger for that reason, since, as has been seen, that clause, unlike the long-and-short-haul clause, may be violated by the charging of the higher through rate whether or not the aggregate-of-intermediate rates is ever actually collected.

In Conference Ruling 220–G the Commission said:

> The Commission has repeatedly announced the view that the law does not permit the use of any rate or fare except that contained in a

> lawful tariff that is applicable via the line, route, and gateway over and through which the shipment or passenger moves. The lawful rate or fare for through movement is the through rate or fare, wherever such through rate or fare exists, even though some combination makes a lower rate or fare and even though the practice in the past has been to give to some the benefit of such lower combination. * * *

While this Conference Ruling was issued in 1907, and therefore before the amendment to section 4, which made unlawful a through rate greater than the aggregate of applicable intermediates, the Commission has reaffirmed its ruling as applicable to the amended fourth section. In 1913 the Commission issued Conference Ruling 443, reading as follows (and, it will be noted, specifically referring to Ruling 220–G):

> Upon inquiry as to whether a through distance tariff rate should be applied in cases where a combination rate, made up of a rate to an intermediate point and a distance tariff rate beyond, makes a lower through charge: *Held*, That the through rate is the only lawful rate. (See Ruling 220–G).

Both of these rulings may be found in volume 45 of the Commission's reports.

In its formal decisions, on the other hand, the Commission has repeatedly recognized that the published rate must be collected, not merely where it violates the aggregate-of-intermediate clause of the fourth

section, but also where it violates the long-and-short haul clause.

Pierpont Mfg. Co. v. *Southern Ry. Co.*, 50 I. C. C. 81.

Oregon Fruit Co. v. *S. P. Ry. Co.*, 50 I. C. C. 719.

Iten Biscuit Co. v. *C., B. & Q. Ry. Co.*, 50 I. C. C. 724; 53 I. C. C. 729.

Illinois Brick Co. v. *Director General*, 57 I. C. C. 320 (p. 322).

Union Tanning Co. v. *Director General*, 57 I. C. C. 357.

Empire Refining Co. v. *Director General* 58 I. C. C. 713.

Chittenton & Eastman Co. v. *Director General*, 68 I. C. C. 267.

Mississippi Valley Iron Co. v. *Director General*, 74 I. C. C. 715.

Wilson & Co. v. *Director General*, 74 I. C. C. 555.

In certain of these decisions it is true that the Commission granted reparation because it found the rates otherwise unlawful. In certain of them, moreover, as will subsequently be pointed out, the Interstate Commerce Commission was itself in error in holding the long-and-short-haul clause violated, since in none of them was there any proof that the lower rate for the longer distance was actually charged and received. Likewise, in certain of them the Commission's own records should have shown that the departures from the long-and-short-haul clause of fourth section were protected by the Commission's fourth section order 7316.

The significance of these cases, however, in connection with this portion of the argument is that whether the Commission was right or wrong in holding that the fourth section was violated, the Commission still held that the higher rate at the intermediate point was the legally applicable rate, even where the Commission awarded reparation because the legally applicable rate was otherwise unlawful.

The grounds upon which the Commission recognizes that section 6 must be construed as mandatory in requiring the collection of the legally published rate, whether or not that rate be unlawful under other sections of the Act, are well set out in the Commission's decision in *Crescent Coal & Mining Co.* v. *C. & E. I. R. R. Co.*, 24 I. C. C. 149, pp. 156, 158. The Commission there says:

> The sole question to be determined in the identity and amount of the lawfully applicable tariff rate in effect at the time these shipments moved, and in so doing we must not confuse the *lawfulness* of the rate *under other sections of the act* with its *legality* under section 6. For example, a rate unreasonably high and unlawful in the sense of section 1 may, nevertheless, be the legally established standard and rule of action under section 6. The sole test of the latter is the due publication of the rate in the manner and form prescribed by the statute. This is true of all interstate rates, at least so far as the shipping public generally is concerned, regardless of how the rate may have come to be established, whether

knowingly in the usual course or inadvertently or for collusive or other improper purposes.

* * * * *

In so finding we do not mean to be understood as sanctioning the action of the carriers in establishing joint rates, divisions, or allowances, in the form of switching charges or otherwise, between the Depue & Northern Railroad and its connections. Should further investigation disclose collusive or unlawful relations between the Depue & Northern (or the Mineral Point Zinc Company) and its trunk line connections in the establishment of such rates or allowances, these matters may be dealt with under appropriate provisions of the act; and even should it appear that this proportional rate was established for improper purposes, it is nevertheless the legal standard of charges for the shipping public until withdrawn under condemnation by the Commission or by voluntary action of the carriers. The point is that regardless of the nature or motive, whether lawful or unlawful, of the negotiations, of whatever character, preceding its establishment, a rate is not affected in its character as the standard rule of action and public rate under section 6 so long as it remains in effect in the manner prescribed in the act and by our tariff regulations. In a proper proceeding its unlawfulness under other sections and the injustice resulting from its enforcement may be corrected by suitable order at the time the Commission is called upon to pass upon its reasonableness and justness.

* * * * *

> *This application of the statute to these facts is not a technical one, but is imperative, not only because in conformity with the strict letter of the law, but with the only construction which will preserve the chief function of section 6*, which, as declared by the Supreme Court, is to accord and require the application of the same rate to all shippers and to promote equality of treatment between them.

While again it is true that, like this court in the *International Coal case*, the Commission did not have before it in the *Crescent Coal & Mining case* any question of the violation of section 4, it is clear, for the reasons already given in connection with the decision of this court in the *International Coal case*, that the same principles must be applied to section 4 in this respect as to the other sections of the Act, and that the chief function of section 6 of the Act can not be preserved unless it be required that the published rate be collected not only where it violates sections 1, 2, and 3, but as well, where it violates section 4.

Of interest in this connection are the decisions of the Interstate Commerce Commission in *Nashville Traffic Bureau* v. *L. & N. R. R. Co.*, 53 I. C. C. 37, and of the St. Louis Court of Appeals of Missouri in *Mobile & Ohio R. R. Co.* v. *Southern Saw Mill Co.*, 251 S. W. 434, in the first of which the Commission, and in the second of which a court both recognized as the legal rate, a rate published in direct contravention of a specific order of the Commission itself.

Before concluding this consideration of the question of the obligation to collect the published rate

under all circumstances, it is desired to point out to the court that such an obligation, so far as the long-and-short-haul clause of the fourth section is concerned, is not necessarily inconsistent with the jurisdiction of a court to award damages for violation of that section without preliminary recourse to the Interstate Commerce Commission. It has already been noted that in this brief the question of the relative jurisdictions of the court and of the Commission in this respect will not be discussed. (See footnote, p. 12.) It will suffice to say here that the right of a court to award damages for violation of the long-and-short-haul clause of the fourth section might be recognized consistently with a due regard for the absolute obligation to collect the published rate imposed by the sixth section, and consistently with a recognition that a court could have no such jurisdiction with reference to the first, second, and third sections. Due regard for the mandate of the sixth section that the published rate be collected and retained would be accorded since the shipper would be required in the first instance to pay that rate, and could only recover damages if he should prove to the court that the fourth section was violated by the actual collection of a lower rate to the more distant point. On the other hand, this would not be inconsistent with the requirement of preliminary resort to the Commission in connection with sections 1, 2, and 3, since, as has been noted, there is no necessity in the case of the

fourth section for administrative determination by the Commission of the degree of unlawfulness, as that is fixed by the fourth section itself, while such administrative determination is necessary to determine the degree of unreasonableness under the first section, or of discrimination or undue prejudice, under the second and third sections. In short, the jurisdiction of a court to grant damages for violation of the long-and-short-haul clause of the fourth section does not necessarily involve any departure from the published rate, or any treatment of such violation as a straight overcharge.

II.

The long-and-short-haul clause of the fourth section is not violated by the mere publication of a higher rate for a shorter than for a longer distance, but only by the actual charging and receiving of a greater compensation for a shorter distance than is actually charged and received for a longer distance. In this respect it is fundamentally distinguishable from the aggregate-of-intermediates clause, which latter clause, while not violated by the mere publication of a through rate higher than the aggregate of intermediates, is violated by the charging of the higher through rate, even though the aggregate of intermediates is never actually charged.

If the Court will refer to the fourth section as printed in the appendix, the Court will immediately note the difference in the language of the long-and-short-haul clause and of the aggregate-of-intermediates clause in this respect.

The long-and-short-haul clause provides that—

> It shall be unlawful for any common carrier * * * to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

On the other hand, the Court will note that the aggregate-of-intermediates clause reads that—

> It shall be unlawful for any common carrier * * * to charge any greater compensation as a through rate than the aggregate-of-intermediate rates subject to the provisions of this act.

It is apparent at once that under the long-and-short-haul clause no greater compensation can be charged or received for a shorter than for a longer distance, unless some compensation is charged for the longer distance. Furthermore, that there can be no transportation of a like kind of property for a shorter than for a longer distance, unless the same kind of property is transported for the longer distance. It is particularly to be noted that the prohibition of the long-and-short-haul clause only applies "over the same line or route." In other words, there is no prohibition against the collection of greater compensation for a shorter than for a longer distance, if the property does not move over the same line or route between the two points. It is a matter of common knowledge that frequently there are two or more routes between

given points, and that rates are often published without any routing restrictions whatever. Therefore, so far as the tariffs themselves are concerned, it would be entirely possible for the same kind of property to move to the more distant point without ever moving through the intermediate point, and therefore without violation of the long-and-short-haul clause, since the movement would not have been "over the same line or route." In other words, it can not be determined whether there has been a violation of the long-and-short-haul clause until there has been actual movement through the intermediate point to the more distant point.

On the contrary, while under the aggregate-of-intermediates clause, as under the long-and-short-haul clause the mere publication of a through rate higher than the aggregate of intermediate rates is not unlawful, unlike the long-and-short-haul clause it is unlawful to charge a through rate higher "than the aggregate of intermediate rates subject to the provisions of this act," whether or not the aggregate of intermediate rates are themselves ever charged, or whether a like kind of property is ever transported under them.

This distinction, moreover, is not without its reasons. More extended reference will subsequently be made to the Congressional Debates in connection with the amendment of the fourth section in 1910, in order to show so far as possible what Congress had in mind in enacting those amendments. It will suffice to say here that the aggregate-of-intermediates

clause was designed principally to obviate those situations where a shipper could, by billing to an intermediate point andby taking constructive possession of a shipment and rebilling it to its ultimate destination, get a lower combination of rates than applied as a through rate from point of origin to ultimate destination.[5] Such situations arose generally, though not always, because the combination of an interstate rate with a lower state rate made a lower aggregate than the through interstate rate. Sometimes such combinations, however, did not contain a state factor, but resulted from one of the intermediate rates being depressed by water or other competition at the intermediate point. Curiously enough, moreover, Congress eliminated the state and interstate combinations from the purview of the fourth section by the provision that the aggregate of intermediate rates should be that "subject to the provisions of this act." What Congress did mean to accomplish, however, was to relieve the shipper from the necessity and inconvenience of having to take actual or constructive possession of his shipment at the intermediate point and of then having to rebill it, and to give the shipper the benefit of the combination of

[5] In this connection see pages 4579 to 4580 and page 4582, Congressional Record, April 12, 1910; pages 4995 to 4986, April 19, 1910; page 5733, May 3, 1910; page 6019, May 12, 1910.

It is to be noted that Chairman Mann of the Interstate Commerce Committee of the House was himself in error as to just what situation the aggregate-of-intermediates clause was intended to meet, apparently believing it involved some element of misrouting.

See also report on hearings before the House Committee on Interstate Commerce, Sixty-first Congress, second session, pages 5 to 6, January 18, 1910; and Report to the House on H. R. 17526, Report No. 923, pages 8 to 9, Sixty-first Congress, second session.

intermediates on the through movement, while at the same time relieving the carrier of the actual additional expense incident to the double terminal service necessarily involved in the reshipment. The very thing, therefore, that Congress sought to eliminate by the aggregate-of-intermediates clause was the necessity of any movement under the intermediate rates by giving the shipper, so far as consistent with section 6 of the Act, the benefit of the aggregate-of-intermediate rates instead of the higher through rate. In this connection the Director General will subsequently undertake to show that the construction for which he contends as to damages under the aggregate-of-intermediates clause accomplishes this purpose of Congress, while it at the same time gives full effect to the requirement of section 6 of the act that the published through rate be collected.

On the other hand, no such situation arose in connection with the long-and-short-haul clause. The shipper for the shorter distance could, of course, accomplish nothing by moving his shipment through the more distant point, since he would then have to pay an additional charge to get the shipment back to the intermediate point where he really wanted it, and in the aggregate, therefore, would finally pay more than, or at least as much as, the original intermediate rate. The injury to him arose only if another shipper did actually ship the same kind of property for a greater distance through the very point to which he shipped at a lower compensation, and he was not interested in the slightest if a lower rate merely existed to the more

distant point without being actually used, since there was no way in which he himself could use it.

It is unfortunate, however, that the Interstate Commerce Commission, in considering both the long-and-short-haul clause and the aggregate-of-intermediates clause of the fourth section, has failed to distinguish between what constitutes violation and what constitutes damage under those respective clauses.

So far as the long-and-short-haul clause is concerned, this is well illustrated by the Commission's decisions in the cases of *Oregon Fruit Co.* v. *Southern Pacific Co.*, 50 I. C. C. 719, and *Iten Biscuit Co.* v. *C., B. & Q. R. R. Co.*, 50 I. C. C. 724; 53 I. C. C. 729. In both these cases the Commission's reports show that there was a failure to prove any movement from the more distant point. Nevertheless, the Commission, instead of dismissing the complaints for failure to prove any violation of the fourth section, treated them as constituting violations of that section, but dismissed them on the ground of fai ure to prove damage because of failure to prove movement from the more distant point. The majority and dissenting reports in both cases readily disclose the inconsistencies to which both the majority and the minority were driven, the majority in trying to defend a correct result arrived at by wrong reasoning, and the minority in attacking the result, instead of attacking the erroneous reasoning by which the correct result was reached.

Again, in the case of *Anaconda Copper Mining Co.* v. *Director General*, 64 I. C. C. 136, the Commission fails

to make clear whether it treats a similar situation as constituting a failure to prove a violation of the long-and-short-haul clause, or a failure to prove damages, or both, and again the majority opinion of the Commission and the dissenting opinion of Commissioner Campbell, show the continued confusion resulting from the Commission's persistent failure to define the grounds upon which it proceeds.

These decisions will not be further analyzed at this time, as it will be necessary to consider them in some detail in connection with the discussion of what constitutes damage in connection with actual violations of the fourth section, as distinguished from what constitutes damage in cases of protected departures. It will suffice to say here that much of what is said in the dissenting opinions in all three cases would be justified if the cases actually involved violations of the long-and-short-haul clause, and that likewise it would be impossible to sustain the action of a majority of the Commission in dismissing the complaints had violations been actually proved.

III.

What constitutes damage in connection with actual violations of the fourth section as distinguished from what constitutes damage in connection with protected departures therefrom; also as distinguished from what constitutes damage where, as here, there is no actual violation of the long-and-short-haul clause because the lower rate was not actually collected for the longer distance.

It has already been noted that under the first proviso of the fourth section the Commission has power to relieve the carriers from the operation of

that section[6] and that where such relief is granted a higher rate may be charged for a shorter distance or a higher through rate may be charged than the aggregate of intermediates, without violation of the fourth section. It, moreover, has been seen that, even where no relief has been granted by the Commission from the operation of the long-and-short-haul clause of the fourth section, that clause is not violated by the mere publishing and charging of a higher rate for a shorter distance than is published for a longer distance, but is only violated if the lower rate for the longer distance is actually charged and received. It has further been noted, however, that even where a departure from the fourth section is protected, the charging of the higher rate for the shorter distance, or of a higher through rate than the aggregate of intermediates, may nevertheless result in a violation of section 1, because such higher rates are unreasonable, or in a violation of section 2 or 3, because they result in discrimination under section 2 or in undue prejudice under section 3. Likewise, it has been suggested that, even where there is no actual departure from the long-and-short-haul clause of the fourth section, because the lower rate for the longer distance was not actually charged, the higher rate may be similarly unreasonable under section 1, though there can be neither a violation of section 4 nor actual discrimination nor undue prejudice under

[6] Certain doubts as to whether this power extends to relief from the aggregate-of-intermediates clause or is confined to the long-and-short-haul clause have frequently been expressed.

section 2 or 3, since the lower rate for the longer distance was not actually charged.

Not only, however, has the Commission persistently confused the question of what constitutes a violation of these respective clauses of the fourth section with what constitutes damage resulting from a violation of those clauses, but it has even more hopelessly confused what constitutes damage incident to actual violation with what constitutes damage incident to protected departures, and, in addition, so far as the long-and-short-haul clause is concerned, with what constitutes damage where there is no actual violation of the fourth section, because the lower rate was not actually collected for the longer distance. The Commission apparently fails to appreciate that the damages resulting from an actual violation of either clause of the fourth section are essentially different from, and are to be differently determined than, the damages arising in the absence of a violation of the fourth section, under other sections of the act, though all may arise from the charging of a higher rate for the shorter distance, or of a higher rate than the aggregate of intermediates.

The controlling importance, however, of this distinction is well illustrated by this very case. While here, as already explained, the record fails to show what was the fact, that is, that the Commission had actually issued an order relieving the Director General on and after June 25, 1918, from the operation of the fourth section, and that the tariffs on their face bore reference to this order, the record still fails

to show any actual violation of the fourth section, because there is no proof, nor was there any attempt to prove, that the lower rate, though published to North Portland, was ever actually charged and received. In other words, the defect of this record in failing to show relief from the fourth section becomes unimportant, since, as there was no actual departure from the long-and-short-haul clause, there was no necessity for relief.

Nevertheless, a consideration both of the nature of the damages recoverable for an actual violation of the fourth section and of the nature of damages which still might result to a shipper even in the absence of a fourth section violation will serve to disclose on the one hand that the practically penal provisions of the fourth section should not be held applicable to the Director General, while on the other hand that a shipper still has protection against damages resulting to him from the charging of a higher rate for a shorter distance or a higher through rate than the aggregate of intermediates, if such higher rates are either unreasonable, in violation of section 1, or unjustly discriminatory or unduly prejudicial, in violation of sections 2 and 3.

Consideration will therefore be given, first, to the nature of the damage resulting from actual violations of either clause of the fourth section, and, second, to the nature of the damage which may result, under other sections of the act, from the charging of a higher rate for a shorter distance, or of a higher through rate than the aggregate of intermediates,

even where such charges did not involve a violation of the fourth section itself.

What constitutes damage in connection with actual violations of the fourth section.

The Commission has in numerous cases considered the question of damage for alleged or supposed violations of both clauses of the fourth section. These cases are too numerous to permit of detailed discussion within the limits of this brief, but for the convenience of the court the more important ones are cited in the footnote.[7] There are, however, certain cases which it is necessary to consider, some dealing with the long-and-short-haul clause and others dealing with the aggregate-of-intermediates clause.

[7] Aggregate-of-Intermediates cases: *Michigan Buggy Co.* v. *G. R. & I. Ry. Co.*, 15 I. C. C. 297; *Lindsay Bros.* v. *B. & O. S. W. R. R Co.*, 16 I. C. C. 6; *White Bros.* v. *A. T. & S. F. Ry. Co.*, 17 I. C. C. 288; *Windsor Turned Goods Co.* v. *C. & O. Ry. Co.*, 18 I. C. C. 162; *Goodwin* v. *Y. & M. V. R. R. Co.*, 31 I. C. C. 25; *Board of Trade of Kansas City* v. *C. M. & St. P. Ry. Co.*, 34 I. C. C. 208; *Through Rates to Points in La. & Tex.*, 38 I. C. C. 153; *Slane Glass Co.* v. *V. & S. W. Ry. Co.*, 39 I. C. C. 586; *Joseph Iron Co.* v. *M. L. & T. R. R. & S. S. Co.*, 40 I. C. C. 525; *Lafayette Chamber of Commerce* v. *L. W. R. R. Co.*, 41 I. C. C. 297; *Blackwell Lumber Co.* v. *M. P. Ry. Co.*, 42 I. C. C. 756; *Alabama Packing Co.* v. *L. & N. R. R. Co.*, 47 I. C. C. 524; *Williams Co.* v. *Pennsylvania Co.*, 50 I. C. C. 531; *Rice Potato Co.*, v. *B. & O. R. R. Co.*, 51 I. C. C. 364; *Texas Cottonseed Crushers' Assn.* v. *G. C. & S. F. Ry. Co.*, 53 I. C. C. 627; *Alabama-Georgia Syrup Co.* v. *L. & N. R. R. Co.*, 58 I. C. C. 521; *Hudson Mule Co.* v. *L. & N. R. R. Co.*, 63 I. C. C. 7; *Standard Rail & Steel Co.* v. *M. P. R. R. Co.*, 73 I. C. C. 219; *American Shipbuilding Co.* v. *Director General*, 77 I. C. C. 439; *Virginia-Carolina Chemical Co.* v. *A. C. L. R. R. Co.*, 78 I. C. C. 107; *Libbey Co.* v. *Director General*, 78 I. C. C. 650; *Lycoming Motors Corp.* v. *E. J. & S. R. R. Co.*, 80 I. C. C. 757; *Davison & Namack Fdy. Co.* v. *Pa. R. R. Co.*, 81 I. C. C. 345.

Long-and-Short-Haul cases: *Randolph Lumber Co.* v. *Seaboard Air Line Ry.*, 13 I. C. C. 601, and 14 I. C. C. 338; *Oregon Fruit Co.* v. *S. P. Co.*, 50 I. C. C. 719; *Iten Biscuit Co.* v. *C. B. & Q. R. R. Co.*, 50 I. C. C. 724, and 53 I. C. C. 729; *Johnston* v. *A., T. & S. F. Ry. Co.*, 51 I. C. C. 356; *Anaconda Copper Mining Co.* v. *Director General*, 64 I. C. C. 136.

Reference has already been made to the fact that in the *Iten Biscuit*, the *Oregon Fruit*, and the *Anaconda Copper* cases the Commission treated those cases, where there was in fact no violation of the long-and-short-haul clause, because no proof that the lower rate for the longer distance had actually been charged, as if that clause had actually been violated, and dismissed those complaints, not as it should have done, because of failure to prove violation, but because of failure to prove damage. Curiously enough, however, the Commission in all those cases, which it erroneously supposed to involve actual violations of the long-and-short-haul clause, undertook expressly to apply the same test as to proof of damage which it would have applied in the absence of any supposed violation, and had the question merely been as to whether damage had otherwise been proved under the first, second, or third sections of the act. This is clearly shown by the two majority reports of Commissioner Hall in the *Iten Biscuit* case and by the dissenting report of Commissioner Harlan in the *Oregon Fruit* case, which was directed to the report in the *Iten Biscuit* case as well. It is to be noted in this connection that Commissioner Harlan erroneously assumed, as did the majority, that an actual violation of the long-and-short-haul clause was involved, and on that assumption his criticism of the decision of the majority as failing to give any force whatever to the express provisions of the long-and-short-haul clause of the fourth section itself is un-

deniably sound. Commissioner Harlan says in the *Oregon Fruit* case, 50 I. C. C. 719, at page 723:

> The majority report nevertheless does not even place upon the carriers at fault the burden of showing that the higher rates at the intermediate points were reasonable and nondiscriminatory, but leaves upon the complainant the burden of supporting its claim for reparation by showing the rates to have been unreasonable or unjustly discriminatory, *precisely as if there were no fourth section at all in the act to regulate commerce.*

That Commissioner Harlan was not in error as to the theory of the majority—that is, that a violation of the fourth section does not involve any different criteria of damage than a violation of the first, second, or third sections—is fully confirmed by the specific holding of Commissioner Hall to this effect, noting on page 733 that the higher rate for the shorter distance was not itself unreasonable. Commissioner Hall had said on page 732, with reference to the decision of this court in the *International Coal* case, 230 U. S. 184:

> While in that case the court was dealing specifically with rebating under section 2, the right of action for damages was under section 8, which applies alike to sections 2, 3, and 4, and what was there said is equally applicable to section 4.

And again on page 733:

> Obviously it would be inconsistent, and contrary to the intent and spirit of the act, to hold that to recover under sections 2 and 3

> there must be proof of damage and under section 4 the departure therefrom is of itself proof of damage.

It should be noted that in the latter quotation from Commissioner Hall's report he assumes that the only alternative to holding that for violations of section 4 there must be the same proof of damage as required by the *International Coal* case for violations of sections 2 and 3, is to hold that under section 4 the departure therefrom is of itself proof of damage. In this Commissioner Hall was doubtless misled by the contention of the complainants in that case, noted at page 731 of his report, where he says:

> With respect to the fourth section departures complainant insists that, regardless of the reasonableness of the rates from and to the more distant points, the rule of the fourth section is absolute, the collection of higher charges from and to Omaha was unlawful *per se*, and the excessive charges must as a matter of law be refunded.

In other words, the complainant there was contending that the collection of the higher charges for the shorter distance was a straight overcharge in violation of section 6 which, it has already been shown herein, could under no circumstances be the case. Commissioner Hall, recognizing that there was no overcharge, however, assumed that the only alternative to so holding, was to require the same proof of damages as under sections 2 and 3.

This, the Director General submits, is a *non sequitur*.

It does not follow that because *some* proof of damages is necessary under the long-and-short-haul clause of section 4, it must be the *same* proof as required under sections 2 and 3 by this court in the *International Coal* case, supra. Indeed this court itself has recognized a different character of proof of damages to suffice under the first section than under the second and third sections. *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531. The Director General believes that there is far more analogy between the test of damage under the long-and-short-haul clause of the fourth section and the test of damage applied by this court in the *Darnell-Taenzer* case to the first section than to that applied by this court to the second and third sections in the *International Coal* case. In the *Darnell-Taenzer* case this court held that a presumption of damage resulted from the payment of an unreasonable rate to the extent of the difference between the rate paid and what the Commission might determine to be a reasonable rate, and that this presumption was not rebutted by showing that the freight rate had been passed on to a third party. Without now going into the question as to whether it is possible to rebut the presumption of damage under the first section, the Director General believes that an analogous presumption of damage arises in the case of a violation of the long-and-short-haul clause of the fourth section, to the extent of the difference between the higher rate charged for the shorter distance and the lower rate charged for the longer distance, and that this pre-

sumption is not rebutted by showing that the higher rate was itself reasonable or by showing that there was no discrimination or undue prejudice by reason of the charging of the lower rate at the more distant point.

The reasons the Director General believes that a presumption of damage for a violation of the long-and-short-haul clause of the fourth section arises to the extent of the difference between the higher rate paid for the shorter distance and the lower rate actually charged for the longer distance are the following:

(1) It is impossible to read the Congressional debates at the time the fourth section was amended in 1910 without coming to the conclusion that it was intended, both as to the long-and-short-haul clause and as to the aggregate-of-intermediates clause, to make the higher rates absolutely unlawful except, at most, to the extent that their initial collections as published rates was required by the paramount provisions of section 6. Indeed, it might almost be said that, so far as Congress was concerned, the requirements of section 6 in this respect were little understood, and that doubtless many participating in the debate assumed that it would be unlawful to collect a rate in violation of section 4 even though it was the published rate. However, as has been seen, so to hold would necessarily result in direct conflict with section 6 and in violation of the consistent position of this court that the published rate must under all circumstances be collected. On the one hand,

therefore, a construction should, if possible, be arrived at which will give full effect to the intent and purpose of section 4 in this respect, while at the same time observing the paramount provisions of section 6.

(2) To permit the question of damage for a violation of the long-and-short-haul clause of the fourth section to depend upon proof that the higher rate for the shorter distance is unreasonable under section 1, or discriminatory or unduly prejudicial under sections 2 or 3, is to read into that clause as necessary elements of damage the very considerations which Congress intended, and specifically attempted to eliminate as necessary elements of unlawfulness under the fourth section. The specific purpose of section 4, as shown both in the debates in Congress (see Report to the House on H. R. 17526, Report No. 923, pages 8 to 9, 61st Congress, 1st Session) and in the decision of this court in the *Intermountain* case, 234 U. S. 576, was to take away from the carriers the power to initiate such rates, even if the higher rate for the shorter distance might be *per se* reasonable, and even if the apparent discrimination or undue prejudice might be justified, and to make such higher rates conclusively unlawful unless permission for their publication had first been obtained from the Interstate Commerce Commission. Therefore, to hold that a shipper is entitled to damages for actual violation of the long-and-short-haul clause only if the higher rate for the shorter distance is unreasonable *per se*, or is unjustly discriminatory or unduly prejudicial, is to give no effect whatever to the express declara-

tion of the fourth section itself that such rates shall be unlawful, other than what would have obtained under the first, second, or third sections, had the fourth section never been enacted, except, of course, such criminal consequences as might attach to a violation. Criminal prosecutions, however, would only be of vicarious comfort to a shipper who nevertheless had to pay the higher rates. Moreover, it appears to be a conclusive answer to any such construction of the fourth section that, so construed, there is no purpose whatever in a carrier's obtaining relief from the long-and-short-haul provisions of the fourth section except to avoid criminal prosecution, since a carrier would subject itself to no greater civil liability by actually violating the long-and-short-haul clause than the liability the carrier would be under even if it first obtained relief from the Interstate Commerce Commission. Yet no one familiar with the history of the fourth section and who has read the Congressional debates can doubt that the chief remedy aimed at was a civil remedy, and that it was the intention of Congress to absolutely forbid a carrier to charge the higher rates without first obtaining the permission of the Interstate Commerce Commission, and, so far as consistent with section 6 to give the shipper the benefit of the lower rates in the absence of such permission.

(3) While it has been shown that there is a fundamental distinction between what constitutes violation under the long-and-short-haul clause and what constitutes violation under the aggregate-of-interme-

diates clause, it is submitted that there can be no difference in the measure of damage once violation is established. The charging of the higher rate for the shorter distance and of the higher through rate than the aggregate of intermediates are equally declared unlawful. The question, therefore, is what damage follows to the shipper from the unlawful act in either case. This can be tested in both cases, as in every case of damage under the act, by determining what the shipper's position would have been had the unlawful act not been committed, and this can best be developed by assuming concrete cases.

Taking first an actual violation of the long-and-short-haul clause, assume a situation where the rate from A to B is $1.00 and the rate from A to C, a more distant point, to which B is intermediate, is 80 cents. It has been shown that there is no violation of the fourth section by the mere publication of these rates, and that no violation occurs merely by charging the $1.00 rate to B unless the 80-cent rate is actually charged to C. While, however, the charging of the 80-cent rate is necessary before a violation can occur, the violation itself does NOT consist in charging the lower 80-cent rate at C, but, under the express terms of the long-and-short-haul clause, consists in charging the higher $1.00 rate at B. In other words, while there can be no violation until the 80-cent rate is charged, because the $1.00 rate would not be a higher rate unless there were a lower rate to which it could be related, the long-and-short-haul clause does not make the charging of the

lower rate the violation, but makes the violation the charging of the higher rate. The question then is, What would have been the position of the shipper had the carrier not charged at B any higher rate than it charged at C? The only possible answer is, since there was no violation until the carrier actually charged the 80-cent rate at C, that once having charged that rate at C, a violation could only have been avoided by charging not greater than an 80-cent rate at B. It is here in particular that the distinction is seen between damages for a violation of sections 2 or 3 and damages for violation of section 4. Under sections 2 and 3, as said by this court in the *International Coal* case, the carrier would have had the option of avoiding the violation of those sections by charging the $1.00 rate at C as well as at B. Under section 4, on the contrary, not having violated that section until the 80-cent rate was charged at C, the 80-cent rate having been charged at C, the only way in which the violation could then be avoided was by charging no greater than the 80-cent rate at B. Or, to state it another way, under sections 2 or 3 a violation may consist in the charging of the higher rate at B or in the charging of the lower rate at C, and might be avoided by charging the higher rate both at B and C, or by charging the lower rate both at B and C. Under section 4, on the contrary, by the express terms of that section, the violation consists solely in charging the higher rate at B, and once the lower rate is charged at C, the violation can not be avoided except by charging the

same rate at B. Here, again, therefore, to make no distinction in the measure of damage incurred by a violation of the specific provisions of the long-and-short-haul clause of section 4, on the one hand, as against the more general provisions of sections 2 and 3 on the other, is to read the long-and-short-haul clause of the fourth section out of the act, since the same damage would have followed had the long-and-short-haul clause of section 4 never been enacted.

(4) Furthermore, there is nothing inconsistent between recognizing what has been previously established; that is, that the lower rate actually published only for the longer distance can not be treated as the legally published rate for the shorter distance, so as to make the charging of the higher rate actually published for the shorter distance a straight overcharge, and at the same time recognizing that the lower rate becomes the measure of damage in a case of actual violation of the long-and-short-haul clause. The carrier is still bound to charge and collect the legally published higher rate, and the shipper can only obtain the benefit of the lower rate by proving either to the Commission or to a court (assuming that a court may have jurisdiction) that an actual violation has occurred. When this is proved the presumption of damage follows. Until it is proved the shipper must pay, and the carrier must retain, the actually published higher rate.

So far as the aggregate-of-intermediates clause is concerned, it is even clearer that the measure of damage must be the difference between the higher

published through rate and the lower published aggregate of intermediates. Not only has it been shown that that clause, unlike the long-and-short-haul clause, is violated even though the lower rates are never actually charged and received, but it has been seen that what Congress specifically aimed at was to give the shipper the benefit of the aggregate-of-intermediate rates without the necessity of rebilling his shipments and without placing upon the carrier the additional expense of such rebilling. Here again, as in the case of the long-and-short-haul clause, the carrier is nevertheless required in the first instance to collect the higher through rate actually published, which must be retained unless the shipper satisfies a court or the Commission that an actual violation of the aggregate-of-intermediates clause has occurred, because a through rate has been actually collected higher than an existing aggregate of intermediates, and because there has been no relief from the provisions of that clause, nor any application for such relief. Moreover, just as in the case of the long-and-short-haul clause, the measure of the damage cannot be made to depend upon the reasonableness or unreasonableness of the through rate, or on the existence or nonexistence of discrimination, or undue prejudice. For, again, to so hold would not only be to ignore the real intent of Congress, and the specific wording of the aggregate-of-intermediates clause itself, but would be to determine the question of damage by tests applicable in any event under sections 1, 2, or 3 had the aggregate-of-intermediates

clause never been enacted, and which Congress intended to eliminate as justification for actual violations of the fourth section.

As in the case of the long-and-short-haul clause, moreover, it will be instructive to apply the test of damage for which the Director General contends to a concrete case. Assume that the through rate from A to C is $1.00, and that there is a local interstate rate from A to B, an intermediate point, of 40 cents, and a local interstate rate from B to C of 40 cents, making the aggregate of intermediates subject to the act 80 cents. The aggregate-of-intermediates clause is violated as soon as the through rate of $1.00 to C is charged, whether or not the 80-cent aggregate of intermediates is actually charged to anyone else. There being an existing aggregate of intermediates of 80 cents, the only way in which violation of the prohibition against the charging of a higher through rate could have been avoided was by charging a through rate no greater than 80 cents. Therefore had the carrier not violated the aggregate-of-intermediates clause, the shipper would only have had to pay 80 cents, instead of the published through rate of $1.00.

The analogy of these criteria of damage for actual violations of the long-and-short-haul clause and of the aggregate-of-intermediates clause of the fourth section, to the criterion of damage applied by this Court in the *Darnell-Taenzer* case to violations of the first section, has already been suggested. Of course the distinction exists that in the case of a violation

of the first section the administrative functions of the Commission must clearly first be resorted to, to determine the measure of unlawfulness, while in the case of a violation of the fourth section the measure of unlawfulness is furnished by that section itself. The real analogy is in the fact that under both the first and fourth sections, once the measure of unlawfulness is determined, a presumption of damage exists to the difference between the unlawful higher rate charged and the lawful lower rate, and in the further analogy in the manner in which that presumption must be overcome, if at all. In the *Darnell-Taenzer* case this court held that where a shipper paid an unreasonable rate there was a presumption of damage to the difference between the unreasonable rate paid and the rate which the Commission should determine would have been reasonable. That this is necessarily so will appear by considering a concrete case. Assume a shipper is charged a rate of $1.00 from A to B, and the Commission afterward determines that a rate of 80 cents would have been reasonable.

Had the first section not been violated, therefore, the shipper would not have been compelled to pay out the additional 20 cents and might have made 20 cents more profit. In the *Darnell-Taenzer* case, however, the carrier contended that because the shipper at A in selling to the ultimate consumer at B, had added to his f. o. b. price at A the full $1.00 rate which he paid, the consumer, and not the shipper was damaged. This court, in holding that the pre-

sumption of damage to the shipper could not thus be rebutted, perhaps unfortunately did not disclose fully the process of reasoning by which this holding may be supported, and the result has been that the reasons underlying the court's conclusion are not generally understood. It must be clear, however, that it would be entirely consistent with the possibilities, and with the shipper's rights, for the shipper, even had the carrier only charged him an 80-cent rate, still to have added in selling to the ultimate consumer at B the full $1.00 in addition to his f. o. b. price at A. In other words, while probably the shipper would not do this, because presumably there would be nothing to suggest the addition of more than the rate actually in effect, still in general there would be nothing which would make it impossible, and nothing to prove that the shipper could not have obtained the same gross price at B as he actually obtained, even had the freight rate been lower. There are, however, conceivable circumstances in which it will clearly appear that the shipper could not have obtained as great a gross price with the lower freight rate, and it is submitted that the proof of such circumstances rebuts the presumption of damage, which would otherwise obtain, by reason of the payment of the higher freight rate. If it should be proved, for instance, that the shipper at A was forbidden by government regulation or by some other controlling condition, to add to his base price at A more than the actual freight rate to B, it must be obvious that, even had the reasonable

80-cent rate been actually in effect instead of the unreasonable $1.00 rate, the shipper would not have been benefited thereby, since he must have proportionately reduced his selling price at B, and therefore that he was not damaged merely because the $1.00 rate and not the 80-cent rate was actually in effect. Such special conditions did not appear in the *Darnell-Taenzer* case, but curiously enough, it has been assumed in construing this court's decision in that case that had they appeared the presumption of damage by reason of the payment of the unreasonable rate still would not have been rebutted. The obvious fact that such a presumption can be so rebutted is only discussed here because the Director General submits that only by proof of similar circumstances can a presumption of damage under either clause of section 4 be rebutted.

Before turning to the consideration of the nature of damage which may yet attend protected departures from either clause of section 4 through incidental violations of sections 1, 2, or 3, it is desired to refer to what Commissioner Hall has said in the *Iten Biscuit* case, 53 I. C. C. 729, at page 731, to the effect that—

> Distinction must be made between the carrier's unlawful act which renders it liable to prosecution and the shipper's right to damages for any pecuniary injury thereby.

In other words, Commissioner Hall, in seeking to support his contention that the test of damage for what he erroneously supposed to have been an actual

violation of section 4 would still be no different from the test of damage under the *International Coal* case had sections 2 or 3 only been violated, had recourse to the undoubted rule that one who claims damages from a public wrong must prove in addition a private injury. The fallacy, however, of seeking to support on this ground the contention that the same rule of private damage must apply to section 4 as to sections 2 and 3 lies in the assumption, which it has been seen is contrary both to the terms of those sections and to the intent of Congress, that the character of unlawfulness is the same under the fourth section as under the second and third sections. In other words, it must be conceded that neither under the first, second, third, nor the fourth sections can a shipper recover damages merely because of the public wrong involved, either under the first in charging an unreasonable rate, or under the second in charging an unjustly discriminatory rate, or under the third in charging an unduly prejudicial rate, or under the fourth in charging a higher rate for a shorter distance than for a longer distance, or a higher through rate than the aggregate of intermediates. Under any of those sections the shipper must prove, in addition to the violation of the public law and the public right, that he has suffered a private injury. The character of that injury necessarily, however, varies with any variation in the nature of the public wrong, since the measure of damage to the shipper in every instance is the difference between what he would have paid or what

profit he would have realized had the particular public wrong not have been committed. This court has recognized by its decisions in the *Darnell-Taenzer* case and the *International Coal* case, respectively, the difference in the public wrong, and therefore the difference in the private damage, which results from a violation, respectively, of the first section on the one hand and of the second and third sections on the other. Just so this court should recognize, what the Commission has failed to appreciate, that there being an essential difference in the nature of the public wrong under the fourth section from the nature of the public wrong under the first, second, and third sections, so also there must be a difference in the nature of the private damage.

The Director General, therefore, submits that it must be clear that for an actual violation of either the long-and-short-haul clause or of the aggregate-of-intermediates clause of the fourth section the measure of damage for all practical purposes, waving aside the question of special conditions which might possibly rebut the presumption, is, in the case of the long-and-short-haul clause, the difference between the higher published rate actually paid for the shorter distance and the lower rate actually charged at a more distant point, and in the case of the aggregate-of-intermediates clause, the difference between the higher through rate and the lower aggregate of intermediates actually published, whether charged or not. It should be understood, however, that practically inflexible as this rule of damage may appear, it is not a

penalty, but is arrived at by the same test as any rule of damage flowing from an unlawful act must be arrived at; that is, what would have been the injured party's position except for the unlawful act. Were it a penalty it clearly would not have been applicable against the Director General. *Mo. Pac. R. R. Co.* v. *Ault*, 256 U. S. 554. Nevertheless, while it is not a penalty, the Director General submits that the public wrong aimed at was one of which it could not be presumed the government itself would be guilty in the operation of the railroads, but rather a wrong incident to the stress of competition under private control. Therefore the Director General contends that the harshness of the rule of damages under the fourth section flowing from the nature of the public wrong at which that section was aimed during private control serves to make clear that that section itself should not be held applicable to him.

Before discussing this ultimate contention, however, it is desired to make clear the nature of the damages which still may result to a shipper, even where departures from the fourth section are protected, or where, as to the long-and-short-haul clause, there is no actual violation of that section because the lower rate for the longer distance was not actually charged. This discussion is essential in order to show that, even if the almost penal provisions of the fourth section be held—as they should be—inapplicable to the Director General, the shippers still have protection against the charging of a higher rate for a shorter distance, or of a higher through rate

than the aggregate of intermediates, if either results in the charging of an unreasonable rate, or in unjust discrimination, or in undue prejudice.

What constitutes damage in connection with protected departures from either clause of the fourth section, or, in the case of the long-and-short-haul clause, where there is no actual violation because the lower rate for the longer distance was not actually charged or received.

No great elaboration of what the Director General has already set out as his position in this respect would seem necessary, as there would seem to be nothing in that position to which the plaintiff is liable to take exception.

On pages 6 to 13 of this brief the Director General has already set out in full, but without argument, his construction of the fourth section with reference to damages, both for actual violations of that section and in connection with authorized departures therefrom, or in the absence of actual violation of the long-and-short-haul clause. That portion relating to damages incident to authorized departures from both clauses of the fourth section, or in the absence of actual violation of the long-and-short-haul clause, appears under (5) on pages 10 to 13. It is unnecessary to repeat here what is there said. Under the preceding heading there has already been a full discussion of the nature of damages under section 1 as determined by this court's decision in the *Darnell-Taenzer* case, and it has been seen that, even in the case of an authorized departure from either clause of the fourth section, or in the case of a lack of actual

violation of the long-and-short-haul clause, because of lack of proof that the lower rate for the longer distance was actually charged, the charging of the higher rate may still be a violation of section 1, against which the shipper is protected by the right to damages provided for a violation of that section.

It has also been seen that, even in the case of a protected departure from the long-and-short-haul clause or from the aggregate-of-intermediates clause, the shipper may still be subjected to unjust discrimination under section 2, or undue prejudice under section 3, and be entitled to damages for such discrimination or undue prejudice, if proof of actual damage can be made as required by this court's decision in the *International Coal* case.

Finally it has been seen that, even where no relief has been granted from the long-and-short-haul clause, and yet that clause has not been violated by the charging of a higher rate for the shorter distance than was published for the longer distance, because the lower rate for the longer distance was not actually collected, the shipper still is protected, if the higher rate is unreasonable in violation of section 1. Of course, no question of damages by way of discrimination or undue prejudice under sections 2 or 3 can arise in such a case, since the lower rate was not actually charged.

What it is desired again to point out, however, is that the Commission by confusing cases of violation of the fourth section with cases of nonviolation has been led from paradox to paradox. This has already

been commented upon in connection with Commissioner Hall's report in the *Iten Biscuit* case, where he treated a case of nonviolation of the long-and-short-haul clause as one of violation, and yet applied the test of damage that would have been correctly applicable to a case of nonviolation, thus rightly dismissing the complaint but for the wrong reason. It is only necessary to point out in this connection the real significance of proof that the lower rate for the longer distance was actually paid in cases of actual violation and in cases of protected departures, respectively. In cases of actual violation, that proof is necessary to establish the violation. In cases of protected departures, that proof is insufficient to establish damage, unless it further be shown that because of the actual payment by a competitor of the lower rate for the longer distance the shipper for the shorter distance was compelled to shrink his price proportionately. *Pennsylvania R. R. Co.* v. *International Coal Co.* supra.

Likewise, the Commission, through failure to note the distinction between cases of actual violation of the aggregate-of-intermediates clause and of protected departures therefrom, has in the *Hudson Mule* case, 63 I. C. C. 6, which was a case of protected departure, brought itself to the paradoxical situation of continuing to term the unreasonableness of a through rate which exceeds the aggregate of intermediates merely *prima facie*, while in effect ignoring the qualification prima facie, by treating the unreasonableness as absolute. In that case the Commission

actually prescribes as reasonable for the future, through rates not only higher than the previous aggregate of intermediates, but higher than the through rates actually charged, and specifically finds that the through rates in the past were not unreasonably high, except as they exceeded the existing aggregate of intermediates, which, substantially as a matter of law, the Commission believes requires them to be held unreasonable.

Indeed, a reading of the Commission's reports can not fail to leave the impression that the Commission's difficulty lies in the apprehension that there must be some more rigid rule of damages for an actual violation of the fourth section than is incident merely to protected departures therefrom, without any exact comprehension of just what that rule should be, and without any appreciation of the distinction between what constitutes violation on the one hand and damage on the other.

In conclusion, therefore, on the question of the proper construction of the long-and-short-haul clause of the fourth section with reference to damage, the Director General respectfully submits that he has established the correctness of the construction as first outlined in this brief, that is—

> (1) That under any and all circumstances the published rate must be collected, whether that rate violates the long-and-short-haul clause because greater than the rate charged and received for a longer distance, or violates the aggregate-of-intermediates clause, because

greater than an existing combination, but that, in either such event, a shipper may make claim for damages under section 8 or 16 of the act. That under no circumstances is the charging and collecting of such published rate an overcharge in violation of section 6, but, on the contrary, is made mandatory by section 6 itself.

(2) That there is a fundamental distinction between what constitutes a violation of the long-and-short-haul clause on the one hand and a violation of the aggregate-of-intermediates clause on the other.

(*a*) That the long-and-short-haul clause is violated only by the actual charging and receiving of a greater compensation for a shorter distance than is actually charged and received for a longer distance, and is not violated by the mere publication of a lower rate as applicable to the longer distance.

(*b*) On the contrary, that the aggregate-of-intermediates clause is violated by the charging of a through rate greater than the published aggregate of intermediate rates, even though such intermediate rates are never actually charged or received.

(3) That while there is thus a distinction as to what constitutes a violation of the respective clauses, once a violation of either is established the measure of damages is substantially the same.

That is, that in the case of the long-and-short-haul clause the shipper is at least presumptively damaged to the extent of the difference between the higher rate charged

and received for the shorter distance and the lower rate actually charged and received for the longer distance, while in the case of the aggregate-of-intermediates clause the shipper is presumptively damaged in the amount of the difference between the higher through rate charged and the lower aggregate of intermediates published. Moreover, that this damage exists in both instances without reference to either the reasonableness or unreasonableness of the higher or the lower rates.

(4) That there is no violation of the fourth section, and therefore no question of damages under that section—

(*a*) Where, as to both the long-and-short-haul clause and the aggregate-of-intermediates clause, the Commission has, under the provisions of the fourth section, relieved the carrier from the operation of that section;

(*b*) Where, as to the long-and-short-haul clause, even though the Commission has not granted relief, there is no proof that the lower rate was actually charged and received from the more distant point.

Assuming that this construction of the fourth section has been established, it has already been shown that under such a construction the plaintiff herein can not recover, since it neither proved nor attempted to prove that any shipments ever moved from Pecos upon which the lower rate was charged and received, or, indeed, that the lower rate was ever charged and received on any shipment. Moreover, it has been seen that the complaint herein did not purport to cover any incidental damages for viola-

tions of sections 1, 2, or 3, and that if it had, such claim for damages would concededly have been beyond the jurisdiction of the court without preliminary recourse to the Interstate Commerce Commission.

It remains to consider whether the fourth section itself can be held applicable to the Director General.

IV.

The Director General should not be held to have been subject to the fourth section.

It has already been suggested that the proper construction of the fourth section with reference to damages for actual violations thereof tends strongly to show that that section could not have been intended to apply to the Director General because of the harshness of the rule of damage necessitated by conditions of private control. Furthermore, it has been noted that questions have at least been raised as to whether or not the Commission has power under the first proviso of the fourth section as amended in 1910 to relieve a carrier from the operation of the aggregate-of-intermediates clause, or whether that power is confined to relief from the long-and-short-haul clause.[8]

[8] Chairman Mann, of the Interstate Commerce Committee of the House, expressly stated during the debates upon this proviso in 1910, "While we have provided that the railroads can not charge less for the longer distance than for a shorter distance, or a less aggregate than the local rates, still it did not mean to make it so absolute that it might not be departed from. We have given the Interstate Commerce Commission, as it was given in the original law, power, upon petition in special cases, after investigation, to authorize a company to charge less for the long haul than they do for the short haul." Pages 4579, 4580, Congressional Record, April 12, 1910.

It will be noted that the first sentence above quoted applies to both clauses of the fourth section, while the second sentence refers spe-

If this power does not extend to the aggregate-of-intermediates clause, further argument is furnished why the fourth section should not be held applicable to the Director General. It would impose upon the government under the aggregate-of-intermediates clause, practically absolute liability for damages from which the Commission would be powerless to relieve it, such stringent liability having been imposed upon private carriers because of abuses incident to competition under private operation without any analogy under Government control.

Again, it has been argued by the plaintiff and by shippers generally that, even if the Commission has power to relieve from both clauses of the fourth section, it can not grant such relief by any such blanket order as it actually made in the case of the Director General. (See its fourth section order 7316 in the Appendix.) Assuming this to be so, it would but make still more clear the impropriety and injustice of attempting to apply the fourth section to the Director General. It would mean that the Director General or, in other words, this government, faced with a tremendous war emergency, demanding an immediate increase in revenue in order, as the President's proclamation recites, to provide for the carrying on of essential transporta-

cifically only to the long-and-short-haul clause. Chairman Mann, however, throughout the debates had a tendency to inapt statement.

On the other hand, the annual report of the Interstate Commerce Commission for 1911, pages 19 and 20, shows that the Commission assumed that its power extended to both clauses, and it has in fact freely considered applications as to both clauses, though relief has seldom, if ever, been granted as to the long-and-short-haul clause.

tion for war purposes, could obtain no practical relief from the Commission from violations of the fourth section surviving over from private control, and involving, if no relief should be obtainable, substantial reductions in revenue, since the emergency made it impossible to investigate each rate and each tariff, and therefore to enter a separate order as to each.

All these considerations, however, are but inducements leading up to the fundamental and insurmountable objection to any attempt to apply the fourth section to the Director General; that is, that the application of that section to the Director General would be in direct and inevitable conflict with the power conferred upon the President by section 10 of the Federal Control Act—

> that during Federal control, whenever in his opinion the public interest requires, *the President may initiate rates*, fares, charges, classifications, regulations, and practices, *by filing the same with the Interstate Commerce Commission*, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the Commission pending final determination.

There is nothing ambiguous about the power conferred upon the President under section 10. It is unrestricted power to initiate rates *by filing* them with the Interstate Commerce Commission. There is no limitation upon the character of the rates to be initiated, and there is specific provision against the Commission suspending their effectiveness after

they are so initiated. Yet if the fourth section be applicable to the Director General, the President, through the Director General, could not by filing a rate with the Interstate Commerce Commission have initiated a rate, the collection of which would violate the provisions of the fourth section, so as to render such a rate a lawful rate free of any ultimate liability, without first obtaining the permission of the Interstate Commerce Commission for such filing, and therefore for such initiation.

That the fourth section as amended in 1910 was specifically intended to and did deprive the carriers of the power to initiate such rates can no longer be a matter of speculation or construction. In the *Intermountain Rate Cases*, 234 U. S. 476, this court, speaking through the late Chief Justice, at pages 482 to 486, said:

> Almost immediately after the adoption of the Act to Regulate Commerce in 1887 (February 4, 1887, c. 104, 24 Stat. 379) the Interstate Commerce Commission, in considering the meaning of the law and the scope of the duties imposed on the Commission in enforcing it, reached the conclusion that the words "under substantially similar circumstances and conditions" of the fourth section dominated the long-and-short-haul clause *and empowered carriers to primarily determine the existence of the required dissimilarity of circumstances and conditions* and consequently to exact in the event of such difference a lesser charge for the longer than was exacted for the shorter haul, and that competition which ma-

terially affected the rate of carriage to a particular point was a dissimilar circumstance and condition within the meaning of the act. *We say primarily, because, of course, it was further recognized that the authority existing in carriers to the end just stated was subject to the supervision and control of the Interstate Commerce Commission* in the exertion of the powers conferred upon it by the statute and especially in view of the authority stated in the fourth section. In considering the act comprehensively it was pointed out that the generic provisions against preference and discrimination expressed in the second and third sections of the act were all-embracing, and were, therefore, operative upon the fourth section as well as upon all other provisions of the act. But it was pointed out that where within the purview of the fourth section it had lawfully resulted that the lesser rate was charged for a longer than was exacted for a shorter haul, such exaction being authorized could not be a preference or discrimination, and therefore illegal. *In re Louisville & Nashville R. R. Co.*, 1 I. C. C. 31. These comprehensive views announced at the inception as a matter of administrative construction were subsequently sustained by many decisions of this court, and to the leading of such cases we refer in the margin. (Pages 482, 483.)

* * * * *

It is also equally clear that in permitting the carrier to judge primarily of the competitive conditions and to meet them at election the statute lodged in the carrier the right to exercise a primary

judgment concerning a matter of public concern broader than the mere question of the duty of a carrier to carry for a reasonable rate on the one hand and of the right of the shipper on the other to compel carriage at such rate, since the power of primary judgment which the statute conferred concerned in a broad sense the general public interest with reference to both persons and places, considerations all of which, therefore, in their ultimate aspects, came within the competency of legislative regulation. *It was apparent that the power thus conferred was primary, not absolute, since its exertion by the carrier was made by the statute the subject both of administrative control and ultimate judicial review.* And the establishment of such control in and of itself serves to make manifest the public nature of the attributes conferred upon the carrier by the original fourth section. Indeed, that in so far as the statute empowered the carrier to judge as to the dissimilarity of circumstances and conditions for the purpose of relief from the long-and-short-haul clause it but gave the carrier the power to exert a judgment as to things public, was long since pointed out by this court. *Texas & Pac. Railway* v. *Interstate Com. Comm.*, 162 U. S. 197, 218.

With the light afforded by the statements just made, we come to consider the amendment. It is certain that the fundamental change which it makes is the omission of the substantially similar circumstances and conditions clause, thereby leaving the long-and-short-haul clause in a sense unqualified except

in so far as the section gives the right to the carrier to apply to the Commission for authority "to charge less for longer than for shorter distances for the transportation of persons or property" and gives the Commission authority from time to time "to prescribe the extent to which such designated common carrier may be relieved from the operation of this section." From the failure to insert any word in the amendment tending to exclude the operation of competition as adequate under proper circumstances to justify the awarding of relief from the long-and-short-haul clause, and there being nothing which minimizes or changes the application of the preference and discrimination clauses of the second and third sections, *it follows that in substance the amendment intrinsically states no new rule or principle but simply shifts the powers conferred by the section as it originally stood; that is, it takes from the carriers the deposit of public power previously lodged in them and vests it in the Commission as a primary instead of a reviewing function.* In other words, the elements of judgment or, so to speak, the system of law by which judgment is to be controlled remains unchanged, but a different tribunal is created for the enforcement of the existing law. This being true, as we think it plainly is, the situation under the amendment is this: *Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist*, because to do so, in the absence of some authority, would not only be inimical

> to the provision of the fourth section but would be in conflict with the preference and discrimination clauses of the second and third sections. *But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission*, the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved and if not is in any event by necessary implication granted. And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third sections. (Pages 483, 484, 485, 486.)

Had Chief Justice White been passing specifically upon the question of the propriety of the application of the amended fourth section to the Director General, he could not have stated more conclusively the insurmountable objections to any such application. It will be noted, from those portions of his opinion which have been here italicized, that the provisions of the fourth section prior to its amendment in 1910 would have been entirely consistent with the unrestricted power conferred upon the President to ini-

tiate rates of any character. It will be observed that Chief Justice White construed the fourth section prior to its amendment as leaving to the carriers the primary right to initiate such rates—

> subject to the subsequent supervision and control of the Interstate Commerce Commission and to ultimate judicial review.

On the other hand, it will be observed that because of the abuses, or supposed abuses, by the carriers in the exercise of this primary judgment Congress—

> shifts the powers conferred by the section as it originally stood; that is, it takes from the carriers the deposit of the public power previously lodged in them and vests it in the Commission as a primary instead of a reviewing function. * * * Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist. * * * But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved and if not is in any event by necessary implication granted.

This being so, the Director General in the operation of the carriers during Federal control must be held to have been exempted from the amended fourth section of the Interstate Commerce Act by the

express provision of section 10 of the Federal Control Act that—

> carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, *except in so far as may be inconsistent with the provisions of this act* or any other act applicable to such Federal control or with any order of the President.

It would be superfluous, therefore, to indulge in any further argument to demonstrate that section 4 as amended is in direct and necessary conflict with the power conferred by section 10 itself upon the President to initiate rates. It, however, may do no harm to suggest why, in any event, it could not reasonably be assumed that that section as amended was intended to apply to the Director General. The amendment was, as already stated, directed to the abuses by private carriers, perhaps less serious than represented to Congress, in the initiation of such situations under the stress of competitive conditions under private operation. It certainly can not be presumed that Congress would impute to the President or the Director General either ulterior motives in initiating such rates or be unwilling to trust the judgment of the President or of the Director General in the first instance. Furthermore, competitive conditions were eliminated by Federal control, which were at the bottom of the evil aimed at during private control. Moreover, without the amendment of 1910 and as section 4 had previously stood, sup-

ported as it was by sections 1, 2, and 3, the President's initial power would have been, like the carriers', in any event, subject to the ultimate review and control of the Commission. The Director General then believes it impossible to reach any other conclusion than that section 4 as amended in 1910 was inapplicable to him.

Curiously enough, however, the Interstate Commerce Commission has itself concluded to the contrary, in the case of *Johnson* v. *A. T. & S. F. Ry. Co.*, 51 I. C. C. 356. More extraordinary still, the Commission undertook to determine a question of this great importance to the Director General in a case to which he was not even a party and in which he had no representation by counsel or otherwise, and over the protest of the then chairman of the Commission, Mr. Daniels. The Commission said, p. 361 of its opinion:

> Question has been raised as to our power to consider at this time applications filed by carriers for relief from the provisions of the fourth section of the act to regulate commerce. It is suggested that those provisions are inconsistent with the purpose of the federal control act of March 21, 1918, and the full exercise of power conferred thereby. That act expressly provides that rates initiated by the President "shall be reasonable and just." Under section 4 of the act to regulate commerce certain widely prevalent forms of unjust, unreasonable, and unduly prejudicial charges are condemned, and the burden is placed upon

the carriers of showing that the situations apparently within the scope of the prohibition are in reality "special cases," justifying the exercise by us of a sound, legal discretion in authorizing departures from the general rules laid down. *It is difficult to see how the enforcement of this section can interfere with a unified, coordinated national control or in any wise hinder the prosecution of the war.* As the situations covered by the fourth section can be reached by orders under the first three sections of the act to regulate commerce, the suggestion is equivalent to saying that we can not do in form what it is lawful to do in substance. These applications were filed by the carriers in accordance with the provisions of the act to regulate commerce. During their pendency they extended a protection to those carriers in maintaining rates that would otherwise have been unlawful. The applications were not withdrawn by the Director General when he assumed control of the railroads and he has obtained the benefit of whatever protection those applications may have afforded. In this connection it may be remarked that the Director General sought and obtained from us fourth section relief as an incident to the rates, fares, and charges initiated by him in his General Order No. 28.

The act to regulate commerce remains in full force and effect except in so far as it may be inconsistent with the provisions of the federal control act or other acts applicable to federal control or with any order of the President. There has been no order of the Presi-

> dent in the exercise of his war powers declaring that the enforcement of section 4 interferes with the efficient operation of railroads and systems of transportation under federal control. Clearly no such declaration is contained in the act itself, and any contention to that effect must be based upon a process of deduction. As to this it is sufficient to say that had the Congress intended to change the effect of section 4 it must be presumed that language appropriate to that end would have been used, as was done with the power of suspension under section 15.

It can only be said with reference to the Commission's foregoing expression of opinion on this question that, had the Commission chanced the possible benefit of an expression of the Director General's views in the premises, the Commission, at least, would not have been permitted to labor under the singular misapprehension indicated in the portion of its opinion first italicized, where the Commission states:

> It is difficult to see how the enforcement of this section can interfere with a unified, coordinated national control, or in any wise hinder the prosecution of the war.

Even, however, without the benefit of the Director General's views on the fourth section, it is impossible to conceive how the Commission could have supposed for a moment that anyone would seriously contend that the enforcement of the fourth section could "interfere with unified, coordinated national control."

On the other hand, the enforcement could conceivably "hinder the prosecution of the war," by depriving the Director General of essential revenues. The Commission, however, not only does not attempt to deny, but even fails to mention, that at least a conceivable, or, as has been shown here, an inevitable, result of the enforcement of section 4 against the Director General would be to deprive the President of the unrestricted power conferred upon him by section 10 of the Federal Control Act to initiate rates by merely filing them.

In fact, the only portion of the Commission's opinion which does not afford its own answer is the last sentence quoted above. Superficially it might seem that since Congress in the Federal Control Act specifically provided that—

> said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the Commission pending final determination—

and thereby expressly exempted the Director General from the power the Commission had under section 15 of the Interstate Commerce Act to suspend rates published by a carrier, Congress would, had it intended to set aside the provision of section 4 of the Interstate Commerce Act as against the Director General, have provided like specific exemption. That no such deduction is justified, however, readily appears when it is understood that the power of the Commission to suspend rates already initiated would still have been consistent with the unrestricted power in the Director General to initiate rates by merely filing

them. Therefore it was necessary for Congress, if the Commission were not to exercise its power to suspend under section 15 of the Interstate Commerce Act as against the President, to exempt the President expressly from the Commission's power in this respect. On the other hand, it was unnecessary, and would have been superfluous, to exempt the President expressly from the requirement of section 4 that application must be made to the Commission for relief from the provisions of the fourth section before lawful rates could be filed involving departures from the provisions of that section, since this was inevitably in conflict with the unrestricted power conferred upon the President under section 10 of the Federal Control Act to initiate rates by merely filing them with the Commission.

The Director General, therefore, submits that, for the reasons specified in this brief, as well as for the additional reasons furnished by the brief heretofore filed in his behalf, this court should reverse the judgment of the Circuit Court of Appeals.

JOHN F. FINERTY,
Assistant General Counsel,
United States Railroad Administration,
Attorney for Petitioner.

WASHINGTON, D. C., *December, 1923.*

APPENDIX.

The Act to Regulate Commerce, as Amended.

* * * * *

SEC. 4. (As amended June 18, 1910.) That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided further,* That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reasons of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall

have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

* * * * *

FOURTH SECTION ORDER NO. 7316—GENERAL NO. 17.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C. on the 27th day of May, A. D. 1918.

Whereas, The President of the United States, through the Director General, United States Railroad Administration, has initiated and prescribed rates, fares, charges, and classifications to be applied on all traffic carried by railroad and steamship lines under federal control, except traffic carried entirely by water to and from foreign countries, as set forth in General Order No. 28, dated May 25, 1918, of said Director General:

And Whereas, The said Director General has requested such relief from the long-and-short-haul and aggregate-of-the-intermediates provision of section 4 of the act to regulate commerce as will permit said carriers under federal control to file schedules containing rates, fares, charges, or classifications

containing departures from aforesaid provisions of section 4, enabling carriers under federal control in the present emergency to secure increased revenues to be derived from increases in rates, fares, charges, and classifications initiated and prescribed by said General Order No. 28 of May 25, 1918:

It is ordered, That in those instances in which carriers under federal control are required by General Order No. 28 of the Director General, United States Railroad Administration, to apply to the movement of traffic locally or jointly, or jointly with carriers not under federal control, higher rates, fares, charges, and classifications for shorter than for longer distances over the same line or route in the same direction, the shorter being included within the longer distance, or rates, fares, charges, and classifications which exceed the aggregate of the intermediate rates, fares, charges, and classifications, as set forth in General Order No. 28 of the Director General, the said carriers be, and they are hereby, authorized to establish such rates, fares, charges, and classifications prescribed in said General Order No. 28 of the Director General without observing the provisions of the fourth section of the act to regulate commerce.

And it is further ordered, That carriers not under federal control maintaining joint rates, fares, charges, and classifications with carriers under federal control may establish such joint rates, fares, charges, and classifications as are necessary to comply with the terms of the said General Order No. 28 of the Director

General without observing the provisions of the fourth section of the act to regulate commerce.

It is further ordered, That this order shall supersede and take the place of any provision or provisions of any fourth section order or orders heretofore issued that may be in conflict herewith.

The Commission does not hereby approve any rates, fares, charges, and classifications that may be filed under this permission, all such rates, fares, charges, and classifications being subject to complaint, investigation, and correction if in conflict with any provision of the act.

By the Commission:

[SEAL.] GEORGE B. MCGINTY,
Secretary.